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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

In re: EXDS, INC. (f/k/a EXODUS COMMUNICATIONS, INC.), <u>et al.</u> , Debtor, <hr/> EXDS, INC. (f/k/a EXODUS COMMUNICATIONS, INC.), Plaintiff, v. DEVCON CONSTRUCTION, INC., SHARP DEVELOPMENT COMPANY, INC., and SHARP LAFAYETTE, LLC, <hr/> Defendants.) Case No.: C05-787 PVT)) STIPULATION AND PROPOSED) ORDER GOVERNING THE DISCOVERY) OF CERTAIN ELECTRONIC) INFORMATION FROM NON-PARTY) ELLYN FREED'S PERSONAL) COMPUTER
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1 WHEREAS, Defendant Devcon Construction Inc. (“Devcon”) has issued a Subpoena
 2 Duces Tecum (the “Subpoena”) to non-party Ellyn Freed (“Freed”) for the discovery of certain
 3 electronic communications in the above-captioned matter (the “Litigation”);

4 WHEREAS, Freed has already produced her business computer in response to the
 5 Subpoena;

6 WHEREAS, Devcon has filed a Motion to Compel Enforcement of Subpoena Duces
 7 Tecum against Freed to produce her personal computer in response to the Subpoena, in addition
 8 to the prior production of her business computer;

9 WHEREAS, for the discovery and disclosure of electronic data, Devcon and Freed seek
 10 adequate protection to afford against the loss of computer evidence and any damage resulting
 11 therefrom; and

12 WHEREAS, Devcon and Freed agree that Freed has a compelling privacy interest in the
 13 personal information on her personal computer, including without limitation highly sensitive
 14 personal financial information;

15 NOW THEREFORE, Devcon and Freed, acting by and through their undersigned
 16 counsel, hereby stipulate as follows:

17 1. As used in this Stipulation, the phrase “Computer Evidence” means electronic
 18 data, records, drawings, software, memory or other information stored, used or maintained in any
 19 computer medium including but not limited to any tape, disk, hard drive, zip drive or other
 20 computer.

21 2. Freed shall permit Kroll Ontrack prompt and complete access to her personal
 22 computer or all hard drives therein (the “Subject Computer”) for the purpose of copying
 23 Computer Evidence therein. Freed and Devcon understand that all Computer Evidence copied
 24 by Kroll Ontrack shall be deemed Confidential and Attorneys Eyes Only pursuant to the
 25 Protective Order under Fed. R. Civ. P. 26(c)(7) in force in the Litigation, Docket Item 74, and
 26 agree that such evidence shall not be used outside of the Litigation or for any other purpose.

27 3. Devcon and Freed agree that, prior to shipment of the Subject Computer to Kroll
 28 Ontrack, Freed may (i) remove all Quicken and Turbo Tax programs, (ii) remove all tax returns,

(iii) remove all files or emails that contain Freed's social security number or the social security number of any family member, (iv) remove all files or emails that contain a financial institution password or pin number, and (v) make a copy of the personal computer hard drive. Devcon and Freed agree that Freed will produce to Devcon a paper copy of any non-privileged files or emails removed pursuant to paragraph 3(iii) or 3(iv) that are responsive to the Subpoena (with any social security numbers, passwords or pin numbers redacted). Any such removed files or emails that are both responsive to the Subpoena and privileged shall be included on a privilege log.

4. At Freed's option, Freed may request, and Kroll Ontrack will promptly provide, an exact sector copy of the images taken by Kroll Ontrack. Freed agrees to pay Kroll Ontrack for all incremental costs associated with any such request.

5. Kroll Ontrack will be instructed and authorized to:

a. Visually and physically examine the Subject Computer and record its condition. Kroll Ontrack shall perform specific computer forensic and electronic discovery tasks agreed to by the parties, as set forth in Appendix A;

b. Connect the Subject Computer to Kroll Ontrack's equipment and make a sector-by-sector forensic image of the Computer Evidence, which will be downloaded to alternate media;

c. Review the Subject Computer on Kroll Ontrack's equipment;

d. Conduct searches of the allocated and unallocated space on the Subject Computer, as set forth in Appendix A.

6. Kroll Ontrack will return the Subject Computer to Freed in a sealed container within seven (7) days of receipt from Freed or her counsel.

7. Kroll Ontrack will be instructed to conduct its data recovery in the least intrusive manner necessary to facilitate the retrieval of such data.

8. Kroll Ontrack's inspection of the Subject Computer will not waive any applicable privilege, doctrine of estoppel, or other doctrine or principle assuring the confidentiality of the information on the computer. Kroll Ontrack will maintain all information in the strictest confidence.

1 9. Aside from the authorized Kroll Ontrack representatives, only personnel
2 nominated by counsel for both Devcon and Freed may be present during the mirror image
3 backup of the electronic media. The computer personnel nominated by Freed's counsel shall
4 have the right, but are not required, to access the electronic media after Kroll Ontrack has created
5 mirror images of said media for the purpose of making additional mirror images. Once Kroll
6 Ontrack has completed the mirror imaging process and returned the Subject Computer to Freed,
7 Freed may return the Subject Computer to normal use or otherwise dispose of the Subject
8 Computer.

9 10. Kroll Ontrack shall have the right to shield from direct observation any
10 proprietary procedures or processes used during the mirror image backups or its subsequent
11 searches of the mirror image backup, as described in Appendix A. If requested, Kroll Ontrack
12 shall make a representative of the company reasonably available for deposition or trial testimony
13 to testify concerning its inspection and findings.

14 11. After Kroll Ontrack has been afforded access per this Stipulation and Order to the
15 Subject Computer and has conducted its data recovery efforts, within 14 days, it shall provide to
16 counsel for both Freed and Devcon a file listing of the data pursuant to the parameters contained
17 in Appendix A.

18 12. Kroll Ontrack shall advise counsel for Freed and Devcon whether any of these
19 files were "deleted" files recovered through forensic analysis and, per the protocols defined in
20 Appendix A, provide counsel for both Freed and Devcon with (i) any available information
21 showing when any recovered "deleted" file was deleted; (ii) the available information about the
22 deletion and contents of any deleted file that cannot be recovered, and (iii) those lists or other
23 documents containing information derived from Kroll Ontrack's inspection as set forth in
24 Appendix A.

25 13. Kroll Ontrack will provide or disclose the contents of any files or other
26 information it develops only in accordance with the protocols specified in this Stipulation and
27 Order, unless otherwise directed by the Court or instructed by counsel for Freed and Devcon by
28 mutual agreement. Kroll Ontrack will search the following three basic kinds of data on the

1 Subject Computer: (i) active files, that is, all files visible to the computer's user on the hard
 2 drive, (ii) previously deleted files that are recovered by Kroll Ontrack, and (iii) unallocated/slack
 3 data on the hard drive that is no longer in a file format. Upon searching these data, Kroll
 4 Ontrack will produce a list(s) of the files that will disclose the identity of the files by listing
 5 certain information as specified in this Stipulation and Order. Concomitant with the disclosure
 6 of the initial listing(s) to counsel for Freed and Devcon, Kroll Ontrack will also produce to
 7 Freed's counsel the full results of its search of the data for review and potential production to
 8 Devcon pursuant to the parameters set forth below.

9 14. Promptly upon receiving the listing(s) and search results from Kroll Ontrack,
 10 Freed's counsel shall review the information for responsiveness to Devcon's Subpoena and for
 11 privilege under the law of the case and any applicable privilege law, and, if applicable, shall
 12 designate any applicable materials under the Protective Order and then produce to Devcon within
 13 21 days all non-privileged documents responsive to the Subpoena or other agreed-upon
 14 information generated by Kroll Ontrack. The parties shall make reasonable efforts to limit the
 15 search results generated by Kroll Ontrack for review by Freed's counsel through methods such as
 16 modifying key words/search parameters or other techniques that Kroll Ontrack suggests.
 17 Counsel for Freed shall also provide Devcon with a privilege log sufficient to allow Devcon to
 18 challenge any claim of privilege by Freed or sufficient for an *in camera* review of documents by
 19 the Court.

20 15. Before Freed provides the Subject Computer to Kroll Ontrack, Kroll Ontrack shall
 21 provide counsel for Freed and Devcon a list of all employees who will have access to or
 22 participate in the creation or review of the Subject Computer or Computer Evidence. Each Kroll
 23 Ontrack employee identified, and an authorized officer on behalf of Kroll Ontrack, shall sign a
 24 writing stating that he or she agrees to comply with the Protective Order entered in this case and
 25 this Stipulation and Order. Kroll Ontrack and its officers and employees participating in this
 26 assignment shall also agree in that writing to be subject to the jurisdiction of this Court for the
 27 purpose of enforcing the Protective Order and this Stipulation and Order.

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1 16. Devcon and Freed agree that any unauthorized disclosure of Freed's personal
2 information on the Subject Computer, including without limitation highly sensitive personal
3 financial information, or any use of such information outside of the Litigation, may cause
4 immediate and irreparable injury to Freed due to the highly sensitive nature of the information.
5 Accordingly, Devcon and Freed agree that, in the event of such unauthorized disclosure or use,
6 Freed may be entitled, without waiving any other rights or remedies, to such injunctive or
7 equitable relief as may be deemed proper by a court of competent jurisdiction.

8 17. At the end of the Litigation, Kroll Ontrack shall return to counsel for Freed all
9 mirror image backups made of the Subject Computer that were in Kroll Ontrack's possession and
10 shall attest that Kroll Ontrack made no other copies and that all documents in Kroll Ontrack's
11 possession containing information restored from, relating to or derived from the original
12 electronic media have been destroyed. In the meantime, Kroll Ontrack shall ensure the security
13 and confidentiality of the original electronic media and information derived from them.

14 18. Communication between Kroll Ontrack and any of the parties shall include all
15 parties except when Kroll Ontrack supplies Freed's counsel with the electronic data or other
16 information recovered or its contents, provided that Kroll Ontrack promptly notifies Devcon that
17 communications took place with counsel for Freed for such purposes.

18 The parties further stipulate, and hereby respectfully request, that the terms of this
19 Stipulation be made an Order of the Court.

20 **SO STIPULATED:**

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22 Dated: May 20, 2005

MILLER, MORTON, CAILLAT & NEVIS, LLP
AND REED SMITH LLP

23
24
25 By: /s/
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Dated: May 20, 2005

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PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: 6/10/05, 2005

/s/ Patricia V. Trumbull
HON. PATRICIA V. TRUMBULL
~~CLERK~~ UNITED STATES MAGISTRATE JUDGE

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